

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SAKARI D. CONNER,)	
)	No. CV-08-0051-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on September 8, 2008. (Ct. Rec. 13, 16). Attorney Jeffrey Schwab represents Plaintiff; Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 16) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13.)

JURISDICTION

Plaintiff protectively filed an application for SSI benefits on February 20, 2003, alleging onset as of November 1, 2001. (Tr.

1 90-94.) The application was denied initially and on
2 reconsideration. (Tr. 39-42, 44-46.) Administrative Law Judge
3 (ALJ) Mary Bennett Reed held the second supplemental hearing on
4 January 31, 2006. (Tr. 772-817.) Plaintiff, represented by
5 counsel, and vocational expert Fred Cutler testified. On May 8,
6 2006, the ALJ issued a decision finding that plaintiff was
7 disabled, but substance abuse materially contributed to the
8 finding, barring eligibility. (Tr. 15-34.) The Appeals Council
9 denied a request for review on January 7, 2008. (Tr. 7-10.)
10 Therefore, the ALJ's decision became the final decision of the
11 Commissioner, which is appealable to the district court pursuant
12 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
13 review pursuant to 42 U.S.C. § 405(g) on February 4, 2008. (Ct.
14 Rec. 1, 4.)

15 **STATEMENT OF FACTS**

16 The facts have been presented in the administrative hearing
17 transcript, the ALJ's decision, the briefs of both Plaintiff and
18 the Commissioner, and will only be summarized here.

19 Plaintiff was 32 years old at onset and has at least a high
20 school education. (Tr. 31.) Plaintiff has past relevant work as
21 a home attendant, cook and kitchen helper, and motor vehicle
22 dispatcher. (*Id.*) She alleges disability as of November 1, 2001,
23 due to agoraphobia, post-traumatic stress disorder (PTSD), anxiety
24 disorder NOS, a lymphatic excision, and right knee and back
25 problems. (Tr. 104.)

26 **SEQUENTIAL EVALUATION PROCESS**

27 The Social Security Act (the "Act") defines "disability"
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1 as the "inability to engage in any substantial gainful activity by
2 reason of any medically determinable physical or mental impairment
3 which can be expected to result in death or which has lasted or
4 can be expected to last for a continuous period of not less than
5 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
6 Act also provides that a Plaintiff shall be determined to be under
7 a disability only if any impairments are of such severity that a
8 plaintiff is not only unable to do previous work but cannot,
9 considering plaintiff's age, education and work experiences,
10 engage in any other substantial gainful work which exists in the
11 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
12 Thus, the definition of disability consists of both medical and
13 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
14 (9th Cir. 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled.
17 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
18 is engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
20 not, the decision maker proceeds to step two, which determines
21 whether plaintiff has a medically severe impairment or combination
22 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
23 416.920(a)(4)(ii).

24 If plaintiff does not have a severe impairment or combination
25 of impairments, the disability claim is denied. If the impairment
26 is severe, the evaluation proceeds to the third step, which
27 compares plaintiff's impairment with a number of listed
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1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
4 App. 1. If the impairment meets or equals one of the listed
5 impairments, plaintiff is conclusively presumed to be disabled.
6 If the impairment is not one conclusively presumed to be
7 disabling, the evaluation proceeds to the fourth step, which
8 determines whether the impairment prevents plaintiff from
9 performing work which was performed in the past. If a plaintiff
10 is able to perform previous work, that Plaintiff is deemed not
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
12 At this step, plaintiff's residual functional capacity ("RFC")
13 assessment is considered. If plaintiff cannot perform this work,
14 the fifth and final step in the process determines whether
15 plaintiff is able to perform other work in the national economy in
16 view of plaintiff's residual functional capacity, age, education
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once plaintiff establishes that a physical or mental
24 impairment prevents the performance of previous work. The burden
25 then shifts, at step five, to the Commissioner to show that (1)
26 plaintiff can perform other substantial gainful activity and (2) a
27 "significant number of jobs exist in the national economy" which
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1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
2 Cir. 1984).

3 Plaintiff has the burden of showing that drug and alcohol
4 addiction (DAA) is not a contributing factor material to
5 disability. *Ball v. Massanari*, 254 F. 3d 817, 823 (9th Cir.
6 2001). The Social Security Act bars payment of benefits when drug
7 addiction and/or alcoholism is a contributing factor material to a
8 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);
9 *Sousa v. Callahan*, 143 F. 3d 1240, 1245 (9th Cir. 1998). If there
10 is evidence of DAA and the individual succeeds in proving
11 disability, the Commissioner must determine whether the DAA is
12 material to the determination of disability. 20 C.F.R. §§
13 404.1535 and 416.935. If an ALJ finds that the claimant is not
14 disabled, then the claimant is not entitled to benefits and there
15 is no need to proceed with the analysis to determine whether
16 substance abuse is a contributing factor material to disability.
17 However, if the ALJ finds that the claimant is disabled, then the
18 ALJ must proceed to determine if the claimant would be disabled if
19 he or she stopped using alcohol or drugs.

20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
23 the Commissioner's decision, made through an ALJ, when the
24 determination is not based on legal error and is supported by
25 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
26 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
27 1999). "The [Commissioner's] determination that a plaintiff is
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1 not disabled will be upheld if the findings of fact are supported
2 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
3 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
4 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
5 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
6 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
7 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
8 573, 576 (9th Cir. 1988). Substantial evidence "means such
9 evidence as a reasonable mind might accept as adequate to support
10 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
11 (citations omitted). "[S]uch inferences and conclusions as the
12 [Commissioner] may reasonably draw from the evidence" will also be
13 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
14 On review, the Court considers the record as a whole, not just the
15 evidence supporting the decision of the Commissioner. *Weetman v.*
16 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
17 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

18 It is the role of the trier of fact, not this Court, to
19 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
20 evidence supports more than one rational interpretation, the Court
21 may not substitute its judgment for that of the Commissioner.
22 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
23 (9th Cir. 1984). Nevertheless, a decision supported by
24 substantial evidence will still be set aside if the proper legal
25 standards were not applied in weighing the evidence and making the
26 decision. *Browner v. Secretary of Health and Human Services*, 839
27 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
28

1 evidence to support the administrative findings, or if there is
2 conflicting evidence that will support a finding of either
3 disability or nondisability, the finding of the Commissioner is
4 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
5 1987).

6 **ALJ'S FINDINGS**

7 The ALJ found at step one that plaintiff has not engaged in
8 substantial gainful activity since onset. (Tr. 15.) At steps two
9 and three, the ALJ found that plaintiff suffers from a back
10 disorder, hearing loss, and a personality disorder, impairments
11 that are severe but which do not alone or combination meet or
12 medically equal a Listing impairment. (Tr. 17, 27-28.) The ALJ
13 found plaintiff less than fully credible. (Tr. 30.) Prior to
14 step four, the ALJ found plaintiff has the following RFC when
15 substance abuse is included: the ability to lift and carry 20
16 pounds occasionally, and ten frequently; sit 6 hours out of 8,
17 stand and/or walk 6 hours out of 8; climb stairs or ramps
18 occasionally; avoid kneeling and crawling; perform simple,
19 repetitive tasks, and avoid interacting with the general public.
20 Plaintiff is capable of superficial interaction with coworkers.
21 Sudden changes require a longer time period to learn changes.
22 Plaintiff has moderate limitations in remembering and
23 understanding detailed instructions, in maintaining attention and
24 concentration for extended periods, and in exposure to hazards and
25 precautions. (Tr. 28.)

26 At step four, relying on the VE's testimony, the ALJ found
27 plaintiff is unable to perform her past relevant work. (Tr. 30.)
28

1 At step five, again relying on the VE, the ALJ found there are no
2 other jobs plaintiff can perform when substance abuse is included.
3 (Tr. 31.) At step five the ALJ found plaintiff disabled. (Tr.
4 32.) The ALJ performed an analysis pursuant to *Bustamante*¹ to
5 determine whether plaintiff would be disabled if she stopped
6 abusing substances. (Tr. 32.) ALJ Reed found that even if not
7 abusing substances, plaintiff would be unable to perform her past
8 relevant work. (Tr. 33.) At the second step five, the ALJ found
9 that if not abusing substances, there are other jobs a person with
10 plaintiff's background and limitations could perform such as
11 cafeteria attendant, sorter, food preparer, and assembler. (Tr.
12 34.) Because plaintiff would not be disabled if she stopped
13 abusing substances, substance abuse is a contributing factor
14 material to the disability determination. (*Id.*) Accordingly, the
15 ALJ found that plaintiff is barred from receiving benefits under
16 the Social Security Act. (*Id.*)

17 ISSUES

18 Plaintiff contends that the Commissioner erred as a matter of
19 law by giving "controlling weight" to the opinions of testifying
20 psychological expert Susan Dragovich, Ph.D., examining
21 psychologist Thomas R. McKnight, Ph.D., and agency consultant
22 Edward Beaty, Ph.D. (Ct. Rec. 14 at 9-10).

23 The Commissioner responds that the ALJ appropriately weighed
24 the medical evidence and asks that the decision be affirmed. (Ct.
25 Rec. 17 at 7-10).

26 DISCUSSION

27 ¹*Bustamante v. Massanari*, 262 F. 3d 949 (9th Cir. 2001).
28

1 **A. Weighing medical evidence**

2 In social security proceedings, the claimant must prove the
3 existence of a physical or mental impairment by providing medical
4 evidence consisting of signs, symptoms, and laboratory findings;
5 the claimant's own statement of symptoms alone will not suffice.
6 20 C.F.R. § 416.908. The effects of all symptoms must be
7 evaluated on the basis of a medically determinable impairment
8 which can be shown to be the cause of the symptoms. 20 C.F.R. §
9 416.929. Once medical evidence of an underlying impairment has
10 been shown, medical findings are not required to support the
11 alleged severity of symptoms. *Bunnell v. Sullivan*, 947, F. 2d
12 341, 345 (9th Cr. 1991).

13 A treating physician's opinion is given special weight
14 because of familiarity with the claimant and the claimant's
15 physical condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th
16 Cir. 1989). However, the treating physician's opinion is not
17 "necessarily conclusive as to either a physical condition or the
18 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
19 751 (9th Cir. 1989) (citations omitted). More weight is given to
20 a treating physician than an examining physician. *Lester v.*
21 *Cater*, 81 F.3d 821, 830 (9th Cir. 1996). Correspondingly, more
22 weight is given to the opinions of treating and examining
23 physicians than to nonexamining physicians. *Benecke v. Barnhart*,
24 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or examining
25 physician's opinions are not contradicted, they can be rejected
26 only with clear and convincing reasons. *Lester*, 81 F. 3d at 830.
27 If contradicted, the ALJ may reject an opinion if he states
28

1 specific, legitimate reasons that are supported by substantial
2 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44
3 F. 3d 1435, 1463 (9th Cir. 1995).

4 In addition to the testimony of a nonexamining medical
5 advisor, the ALJ must have other evidence to support a decision to
6 reject the opinion of a treating physician, such as laboratory
7 test results, contrary reports from examining physicians, and
8 testimony from the claimant that was inconsistent with the
9 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
10 751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9th
11 Cir. 1995).

12 Plaintiff contends that the ALJ improperly relied on the
13 opinions of several psychologists (testifying psychologist Dr.
14 Dragovich, consulting psychologist Dr. Beaty, and examining
15 psychologist Dr. McKnight), and failed to give controlling or
16 appropriate weight to the opinions of other treating
17 professionals: Wendy Mason, ARNP (cited by plaintiff by reference
18 to Tr. 685-686 but not named), and Robert Ebel, PAC. (Ct. Rec. 14
19 at 8-10.) Plaintiff argues that the ALJ did not properly credit
20 the opinion of examining physician Robert Schneider, M.D., or the
21 July 21, 2005 opinion of examining psychologists Sean Caldwell,
22 M.S. candidate, under the supervision of Mahlon Dalley, Ph.D.
23 (Ct. Rec. 14 at 8-9). Because the ALJ found plaintiff
24 disabled, the issue on review is whether she applied the correct
25 legal standards and substantial evidence supported her
26 determination that DAA is material to the disability
27 determination; i.e., whether plaintiff would be disabled if
28 substance abuse ceased.

DAA

To determine if plaintiff would still be disabled if substance abuse stopped, the ALJ relied in part on Dr. McKnight's April 18, 2003 evaluation. (Tr. 19, referring to Exhibit 15F at Tr. 519-526.) After conducting several tests, Dr. McKnight noted plaintiff's questionable effort and assessed a GAF of 70,² if plaintiff remained drug free. (Tr. 525.) With respect to this evaluation, the ALJ observed plaintiff complained to Dr. McKnight of panic attacks and difficulty being around other people. She reported migraine headaches, generally under good control with medication. Plaintiff used vicodin chronically, reportedly 2-3 times a week, as well as klonopin for panic attacks, although she currently being weaned from it. Plaintiff stopped attending counseling because the counselor kept falling asleep. She was treated in a psychiatric unit for 48 hours in 2000 or 2001 after police found her carrying a gun. Plaintiff admitted smoking marijuana daily as recently as October 2002. She used heroin once a week for 3-4 months in 2000 after the death of her mother. Plaintiff stopped working in December 2001 due to panic disorder and PTSD. After being sexually assaulted in October 2001, she filed charges, but nothing happened. She admitted being intoxicated at the time of the assault. Plaintiff

²A GAF (Global Assessment of Functioning) of 70 indicates some mild symptoms (e.g., depressed mood and mild insomnia) or some difficulty in social, occupational, or school functioning (e.g., occasional truancy, or theft within the household), but generally functioning pretty well, has some meaningful interpersonal relationships. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION (DSM-IV), at p. 32.

1 was arrested for drug possession and spent a night in jail when
2 she was with someone who had drugs. (Tr. 19-20.)

3 The ALJ points out Dr. McKnight's observations and
4 assessment:

5 Effort during examination was episodically
6 questionable, and she became somewhat agitated when
7 challenged. At times, her behavior was rather passive-
8 aggressive, and she refused to respond to specific
9 questions during formal testing. There was no
10 indication of anxiety or panic during the evaluation.
11 She seemed slightly intoxicated, but there was no
12 smell of alcohol or other substances. . . [Plaintiff's]
13 MMPI-2 validity profile indicated she was attempting
14 to create a rather pathological self-picture. Dr.
15 McKnight reported she appeared to be functioning at
16 least within the average range of measured intellectual
17 ability and her memory on memory tasks was adequate.
18 She denied any difficulty with daily living activities
19 or personal care. She reportedly visited with others,
20 had visitors, and attended parent-teacher meetings on
21 occasion. She enjoyed shooting baskets and watching
22 videos. . . . Dr. McKnight reported she did not have
23 the signs and symptoms necessary for a diagnosis of
24 [PTSD] or panic disorder. Dr. McKnight diagnosed
25 anxiety disorder [NOS] by self-report, no current
26 signs, cannabis abuse in remission by self-report,
27 rule out current use, passive-aggressive and schizoid
28 features, and global assessment of functioning of 70
(if drug free). Dr. McKnight opined that she was
capable of pursuing a variety of jobs involving three
step repetitive tasks, and had demonstrated greater
vocational skill. She would probably work better in
jobs that did not require ongoing contact with the
public or significant interpersonal skills.

(Tr. 20.)

21 The ALJ relied on the testimony of Dr. Dragovich in assessing
22 plaintiff's RFC. (Tr. 22-23, referring to Tr. 734-769). Dr.
23 Dragovich reviewed the record (Tr. 735), which was later expanded
24 (Tr. 772.) She opined that plaintiff's primary diagnosis is
25 borderline personality disorder and substance abuse (marijuana
26 dependence and use and abuse of prescription medications). PTSD,
27 depression and anxiety/panic attacks are noted by treating
28

1 professionals as well as plaintiff to have resolved or are not
2 present. (Tr. 736, 750, 752-754.) Dr. Dragovich opined that PTSD
3 and panic are present in the record from February of 2003 until
4 about June of 2004, with a "lot of problems with compliance."
5 (Tr. 736.) Dr. Dragovich opined that when substance abuse is
6 included, plaintiff has a moderate limitation in concentration and
7 persistence, understanding and remembering detailed instructions,
8 maintaining concentration and attention for extended periods, and
9 perhaps for hazards and precautions (Tr. 739, 742), in addition to
10 taking longer than normal to adapt to unanticipated changes in the
11 workplace. (Tr. 740-741, 743.)

12 Dr. Dragovich disagreed with Mr. Caldwell and Dr. Dalley's
13 2005 diagnosis of somatoform disorder, finding that plaintiff's
14 exaggerated response to medical problems is subsumed under the
15 personality disorder category. (Tr. 743.) She pointed out that
16 Caldwell and Dalley's assessed somatoform disorder and rule
17 anxiety disorder NOS are confounded by drug usage, in that their
18 evaluation indicates an extended period of abstinence is necessary
19 to determine an accurate diagnosis. (Tr. 757.)

20 To aid in weighing the conflicting medical evidence, the ALJ
21 evaluated plaintiff's credibility and found her less than fully
22 credible - an assessment not challenged on appeal. (Tr. 30-33.)
23 Credibility determinations bear on evaluations of medical evidence
24 when an ALJ is presented with conflicting medical opinions or
25 inconsistency between a claimant's subjective complaints and
26 diagnosed condition. See *Webb v. Barnhart*, 433 F. 3d 683, 688
27 (9th Cir. 2005).

28 It is the province of the ALJ to make credibility

1 determinations. *Andrews v. Shalala*, 53 F. 3d 1035, 1039 (9th Cir.
2 1995). However, the ALJ's findings must be supported by specific
3 cogent reasons. *Rashad v. Sullivan*, 903 F. 2d 1229, 1231 (9th
4 Cir. 1990). Once the claimant produces medical evidence of an
5 underlying medical impairment, the ALJ may not discredit testimony
6 as to the severity of an impairment because it is unsupported by
7 medical evidence. *Reddick v. Chater*, 157 F. 3d 715, 722 (9th Cir.
8 1998). Absent affirmative evidence of malingering, the ALJ's
9 reasons for rejecting the claimant's testimony must be "clear and
10 convincing." *Lester v. Chater*, 81 F. 3d 821, 834 (9th Cir. 1995).
11 "General findings are insufficient: rather the ALJ must identify
12 what testimony not credible and what evidence undermines the
13 claimant's complaints." *Lester*, 81 F. 3d at 834; *Dodrill v.*
14 *Shalala*, 12 F. 3d 915, 918 (9th Cir. 1993).

15 The ALJ relied on several factors when assessing credibility,
16 including the lack of objective evidence supporting plaintiff's
17 subjective complaints. (Tr. 30.) The ALJ points out that
18 plaintiff's testimony that she is severely limited in the ability
19 to sit, stand, walk and lift is undercut by MRI and x-rays
20 showing "only mild degenerative disc disease without nerve root
21 impingement," knee x-rays within normal limits despite testimony
22 of knees giving way; and complaints of seizures with very little
23 objective evidence supporting a significant ongoing problem.

24 The ALJ relied on plaintiff's inconsistent statements, noting
25 she reported seizures began after a motor vehicle accident in
26 2004, yet later told Mr. Ebel, PAC, seizures began after a car
27 accident on New Years in 2002. (Tr. 30.) Plaintiff told hospital
28 staff she cut herself to relieve pain; a month later she reported

1 she had not cut herself in over a year. (Tr. 30.) The ALJ
2 observes plaintiff over reported symptoms on the MMPI-2, performed
3 inconsistently on other tests, failed to comply with mental health
4 treatment recommendations, made statements about her substance
5 abuse to treatment providers which was inconsistent with test
6 results, and engaged in drug-seeking behavior. (Tr. 30.) Even
7 applying the higher standard, the ALJ's unchallenged credibility
8 determination is supported by clear and convincing reasons.

9 When she weighed the medical opinions and assessed
10 plaintiff's RFC, the ALJ considered plaintiff's credibility, the
11 objective medical evidence, the results of psychological testing,
12 and the opinions of treating (Jason Cash, M.D.), examining
13 (McKnight) and reviewing physicians (Scottolini, Beaty, Dragovich)
14 that plaintiff is capable of at least a range of light work. (Tr.
15 32.)

16 Plaintiff contends the ALJ should have given controlling
17 weight to the contradicted opinions of treatment providers and
18 examining professionals (Caldwell and Dalley, Schneider, and PAC
19 Ebel) rather than the opinions of Drs. McKnight, Beaty and
20 Dragovich, that plaintiff's non-exertional limitations are *de*
21 *minimus*. (Ct. Rec. 14 at 8-9.) Plaintiff's argument is
22 unsupported by the record. It is clear that the ALJ's
23 hypothetical included more than *de minimus* non-exertional
24 limitations because ALJ Reed found plaintiff disabled when DAA is
25 included.

26 The ALJ relied on evidence in addition to the testimony of
27 the nonexamining medical advisor, Dr. Dragovich, in rejecting some
28 of the other medical opinions. The ALJ rejected some of the

1 opinions of examining psychologists Mr. Caldwell and Dr. Dalley
2 based on the opinion of examining psychologist Dr. McKnight, a
3 specific and legitimate reason. *See Magallanes*, 881 F. 2d at 751-
4 52 (9th Cir. 1989); *Andrews*, 53 F. 3d at 1042-43 (9th Cir. 1995).
5 The ALJ also relied on the notation in the later report (by
6 Caldwell and Dalley) that their diagnosis was provisional,
7 indicating that an extended period of abstinence is necessary to
8 accurately diagnosis of the extent of plaintiff's anxiety
9 disorder. (Tr. 25-26.) This is a specific and legitimate reason.

10 Plaintiff appears to argue that the opinion of Robert Ebel,
11 PAC, is entitled to controlling weight as a treating physician.
12 (Ct. Rec. 14 at 9.) As the Commissioner correctly observes, Mr.
13 Ebel is not an acceptable medical source whose opinion is entitled
14 to controlling weight. (Ct. Rec. 17 at 9.) Plaintiff argues
15 that to the extent the ALJ relied on Dr. Dragovich's opinion,
16 remand is required because Dr. Dragovich did not have the benefit
17 of the medical records submitted after the hearing. (Ct. Rec. 14
18 at 4-10). Plaintiff alleges that

19 Dr. Dragovich's failure to make an Axis I diagnosis

20 "when all of the mental health counseling records since the
21 protective filing date support an Axis I diagnosis, it cannot be
22 overstated that these additional records are so material as to
23 require remand." (Ct. Rec. 14 at 6.)

24 Plaintiff's argument is flawed in several respects. The ALJ
25 considered the evidence submitted after Dr. Dragovich's testimony,
26 and it is the ALJ who is ultimately responsible for weighing the
27 medical evidence. The ALJ rejected some of the contradicted
28 medical opinions, as noted, based on specific legitimate reasons

1 supported by substantial evidence. The ALJ found plaintiff
2 disabled when DAA is included, relying on evidence in addition to
3 Dr. Dragovich's testimony, including Dr. McKnight's opinion. The
4 ALJ found that with respect to anxiety disorder and PTSD (the Axis
5 I diagnosis plaintiff contends Dr. Dragovich improperly omitted),
6 "mental health records have consistently shown that her depressive
7 and anxiety symptoms were significantly improved on medications."
8 (Tr. 33, referring in part to Exhibit 3F, 12F at Tr. 426.) Dr.
9 Dragovich and the ALJ referred to the records submitted at the
10 hearing. (Tr. 750-757.)

11 The records submitted after the hearing do not change the
12 analysis. The Commissioner correctly points out that the ALJ
13 specifically addressed this evidence, accurately characterized as
14 a fairly detailed history of plaintiff's continued abuse of
15 marijuana and prescription pain medications, as well as
16 noncompliance with treatment plans and goals. (Ct. Rec. 17 at 8,
17 referring to Tr. 23, 600, 602, 612, 618, 648, 654, 662, 674, 682,
18 and 684).

19 The ALJ is responsible for reviewing the evidence and
20 resolving conflicts or ambiguities in testimony. *Magallanes v.*
21 *Bowen*, 881 F. 2d 747, 751 (9th Cir. 1989). It is the role of the
22 trier of fact, not this court, to resolve conflicts in evidence.
23 *Richardson*, 402 U.S. at 400. The court has a limited role in
24 determining whether the ALJ's decision is supported by substantial
25 evidence and may not substitute its own judgment for that of the
26 ALJ, even if it might justifiably have reached a different result
27 upon de novo review. 42 U.S.C. § 405 (g).

28 The ALJ provided clear and convincing reasons for finding

1 plaintiff's allegations not fully credible. The ALJ weighed the
2 medical evidence and found plaintiff disabled when DAA is
3 included. The ALJ failed to adopt the opinions of some treating
4 and examining professionals. Instead, she relied on the opinions
5 of other treating, examining and consulting physicians,
6 plaintiff's credibility, the results of psychological testing, and
7 other medical test results.

8 The ALJ's assessment of the medical and other evidence is
9 supported by the record and free of legal error.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ's conclusions, this
12 court finds that the ALJ's decision is free of legal error and
13 supported by substantial evidence..

14 **IT IS ORDERED:**

15 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
16 **GRANTED.**

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
18 **DENIED.**

19 The District Court Executive is directed to file this Order,
20 provide copies to counsel for Plaintiff and Defendant, enter
21 judgment in favor of Defendant, and **CLOSE** this file.

22 DATED this __ day of October, 2008.

23 s/ James P. Hutton

24 JAMES P. HUTTON
25 UNITED STATES MAGISTRATE JUDGE
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27
28